

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

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|--|---|----------------------|
| RUTH PAGH |) | |
| Claimant |) | |
| VS. |) | |
| |) | Docket No. 1,062,112 |
| CROSS MANUFACTURING, INC. |) | |
| Respondent |) | |
| AND |) | |
| |) | |
| TRAVELERS CASUALTY & SURETY CO. |) | |
| Insurance Carrier |) | |

ORDER

Claimant requests review of the October 15, 2012, preliminary Order Denying Compensation entered by Administrative Law Judge Pamela J. Fuller.

APPEARANCES

Mitchell W. Rice, of Hutchinson, Kansas, appeared for the claimant. William L. Townsley, of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record consists of the October 1, 2012, Evidentiary Depositions of Mary Shoop, Jama Hommertzhaim, Becky Castaneda, and Frank Brough, with attached exhibits; and the October 10, 2012, Preliminary Hearing Transcript with attached exhibits, and the documents of record filed with the Division.

ISSUES

The Administrative Law Judge (ALJ) found claimant failed to give timely notice of her injury as required by K.S.A. 2011 Supp. 44-520(a)(1), and denied claimant's request for temporary total disability compensation and medical treatment.

The claimant requests review of whether she gave proper notice. Claimant argues that the testimony of Ms. Castaneda is too unreliable to defeat claimant's direct testimony and therefore the Board should reverse the ALJ's Order.

Respondent argues that the ALJ's Order should be affirmed.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

Claimant began working for respondent in January 2012 as a machinist on the tube line. This was not the first time claimant had been employed by respondent. Claimant contends that she injured her right shoulder in the course of her employment while working on a skiver. Claimant had just started training on the skiver machine because she was replacing Kenny Dolman, who left the company. She was being trained by Mary Shoop while she learned to operate the machine.

Claimant testified that on Friday, February 24, 2012, she was doing a change-over, taking out old face plates and putting new ones in when the 35 - 40 pound weight of the face plate carried her into the bed of the machine. Claimant almost fell in, and felt a pull in her right shoulder at that time. Claimant did not report this incident because her lead, Becky Castaneda, was not working that day. The next morning her shoulder started to ache and hurt.

On Monday, February 27, 2012, the next working day after the incident, claimant was talking with Ms. Castaneda during the lunch break about how she must be more out of shape than she thought because she was sore from almost falling into the skiver the day before. Claimant was not advised to fill out an accident form and one was not filled out for her. Claimant was also not offered any treatment.

Claimant did participate in the creation of a February 27, 2012, "First Aid Reporting for minor injuries-Lewis Facility", form which identified claimant's adverse reaction to the blue gloves she was wearing. There is no mention on the form of shoulder complaints. Claimant testified that she could not say for sure if respondent had a first aid station. However, claimant was taken to first aid on February 27, 2012, after she complained of her reaction to the gloves. Claimant suffered an injury, to her right thumb, on June 14, 2012, when she dropped a plate on it. An accident report was also filled out for that injury.

Claimant eventually sought treatment, on her own, with her family physician at the Pawnee Valley Medical Associates for her right shoulder on March 16, 2012. Claimant had gone in for a follow-up examination for her asthma and, since she was having trouble with her shoulder, she reported it to her family physician's nurse practitioner, Kara Keenan, APRN. The Pawnee Valley Medical Associates medical report from March 16, 2012,

stated that claimant's shoulder pain began two weeks prior. The medical report also states "There was no obvious precipitating injury."¹ Claimant met with the nurse practitioner again on May 9, 2012, for her asthma and the right shoulder complaints. Claimant still did not mention the shoulder injury as being work-related.

Claimant had an x-ray on May 16, 2012, and an MRI on May 24, 2012. The MRI revealed partial thickness tears in the supraspinatus and a torn ligament. Claimant denies any prior shoulder problems. Claimant did not report to respondent that she had sought medical attention for her shoulder. All of this treatment was paid through claimant's insurance and it wasn't until claimant spoke with Rob and Jama (Hommertzheim) in July 2012 that a workers compensation claim was filled out for the shoulder.

Claimant is on FMLA for her right shoulder because respondent did not want to accommodate claimant's light duty restrictions. Claimant testified the restrictions were from her family physician and from Dr. Rhodes, an orthopaedic physician. Claimant was involved in an automobile accident on June 24, 2012. However, she testified she suffered no injuries from that accident.

The first time respondent officially learned claimant was claiming a work-related injury to her right shoulder was on July 2, 2012, when claimant went to HR asking for time off to receive treatment for her right shoulder. Claimant was asked for restrictions and she provided them on July 23, 2012. Claimant denied that she aggravated an old injury.

Becky Castaneda, a machine operator and welder for respondent, testified that she worked for respondent for a total of 19 years, on two separate occasions. When Ms. Castaneda worked second shift, she was a team leader. Part of her job was to make sure the workers were doing their jobs and to provide extra help when needed.

Ms. Castaneda testified all new employees go through orientation and are taught how to report an injury. The employees are to go to the first aid room, document what happened and report the accident to their immediate supervisor. If one is not available that day the accident is to be reported the next business day. Ms. Castaneda doesn't recall claimant ever reporting a shoulder injury in February at work. She does recall claimant receiving first aid and reporting the injury to her hands on February 27, 2012. Claimant was treated and returned to work from that incident.

Ms. Castaneda was on vacation on February 24, 2012, the day claimant alleges she injured her shoulder. Ms. Castaneda acknowledged she could lose her job if she failed to report all injuries that were reported to her. She didn't learn that claimant was claiming a work related injury until she was called in to her supervisor Jama's office on July 10, 2012.

¹ P.H. Trans., Resp. Ex. 1 at 1.

Mary Shoop, a machinist for respondent, worked on the same shift as claimant. Claimant never told her claimant had injured her shoulder while operating the skiver in February 2012. She does recall claimant telling her at some point that she reaggravated an old injury from her time at GBI. Claimant didn't say how she hurt or reaggravated her shoulder. Ms. Shoop did not find out that claimant was claiming a work-related shoulder injury until July 2012.

Jama Hommertzhaim, human resource specialist for respondent, has worked for respondent for 14 years. She is in charge of all of the workers compensation claims and supervises the payroll, among other duties. Ms. Hommertzhaim testified that, as part of orientation, employees are given a handbook which indicates the procedure for reporting a work injury. The employees must report all injuries immediately no matter how minor. In the event the injury requires more than first aid, the employee is taken to the nearest medical facility for treatment. Ms. Hommertzhaim testified that if an employee fails to report an accident it would result in a five-day suspension for a first offense.

Ms. Hommertzhaim became aware of claimant's work-related injury claim on July 2, 2012, when claimant came into her office requesting time off for shoulder surgery. Claimant reported her shoulder injury at work, but was using her personal insurance to obtain treatment. Ms. Hommertzhaim testified claimant could have reported her alleged work-related accident during her April 2012 evaluation, but she didn't.

Claimant's co-worker, Frank Brough, would socialize with claimant during their breaks. He doesn't recall claimant complaining about injuring her shoulder in February while working. Mr. Brough first learned of claimant's shoulder problems in April 2012 right before their shift. He stated that claimant talked about reaggravating an old shoulder injury from another employer. However, Mr. Brough never saw claimant favoring her shoulder until after her automobile accident. Mr. Brough always helped claimant with her work by lifting all of the heavy plates into the skiver.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.²

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.³

² K.S.A. 2011 Supp. 44-501b and K.S.A. 2011 Supp. 44-508(h).

³ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

K.S.A. 2011 Supp. 44-520 states:

(a) (1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:

(A) 30 calendar days from the date of accident or the date of injury by repetitive trauma;

(B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or

(C) if the employee no longer works for the employer against whom benefits are being sought, 20 calendar days after the employee's last day of actual work for the employer.

Notice may be given orally or in writing.

(2) Where notice is provided orally, if the employer has designated an individual or department to whom notice must be given and such designation has been communicated in writing to the employee, notice to any other individual or department shall be insufficient under this section. If the employer has not designated an individual or department to whom notice must be given, notice must be provided to a supervisor or manager.

(3) Where notice is provided in writing, notice must be sent to a supervisor or manager at the employee's principal location of employment. The burden shall be on the employee to prove that such notice was actually received by the employer.

(4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.

(b) The notice required by subsection (a) shall be waived if the employee proves that (1) the employer or the employer's duly authorized agent had actual knowledge of the injury; (2) the employer or the employer's duly authorized agent was unavailable to receive such notice within the applicable period as provided in paragraph (1) of subsection (a); or (3) the employee was physically unable to give such notice.

(c) For the purposes of calculating the notice period proscribed in subsection (a), weekends shall be included.

Claimant contends she provided notice of her right shoulder injury on February 27, 2012. However, a first aid report created on that date discusses only claimant's adverse reaction to the employer provided gloves she was wearing. There was no mention of a shoulder injury or problem. None of claimant's co-workers support her testimony that she told respondent of the shoulder injury on February 27. The first medical record created after the alleged date of accident, on March 16, 2012, discusses the right shoulder, but fails to claim a work-related connection. In fact, the report states "There was no obvious precipitating injury."

Claimant had 30 days from the date of the accident to provide timely notice to respondent. The first notice date supported in this record did not occur until July 2012 well beyond the 30 day statutory limit. This Board Member finds that claimant failed to provide timely notice of her alleged accident. The Order of the ALJ denying benefits is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁴ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant failed to provide respondent with timely notice of her alleged accident. The denial of benefits by the ALJ is affirmed.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Pamela J. Fuller dated October 15, 2012, is affirmed.

⁴ K.S.A. 2011 Supp. 44-534a.

IT IS SO ORDERED.

Dated this _____ day of December, 2012.

HONORABLE GARY M. KORTE
BOARD MEMBER

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Pamela J. Fuller, Administrative Law Judge